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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-649

JOSEPH BELLIZZI,
Petitioner,

v.

SUPERIOR COURT OF STANISLAUS COUNTY,
Respondent,

THE PEOPLE OF THE STATE OF CALIFORNIA,
Real Party in Interest.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

BRIEF OF REAL PARTY IN INTEREST PEOPLE OF THE STATE OF CALIFORNIA IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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OPINIONS BELOW

On January 30, 1974, the California Court of Appeal, Fifth Appellate District, issued its opinion granting a preemptory writ of prohibition restraining respondent superior court from further proceeding with the action against petitioner other than to order a dismissal of that action (*see* Appendix B to the petition).

On July 11, 1974, the California Supreme Court denied the petition for writ of prohibition (*see* Appendix A to the petition).

JURISDICTION

Petitioner asserts jurisdiction under 28 U.S.C. section 1257(3).

QUESTION PRESENTED

Whether the rejection of the petitioner's speedy trial claim because the only prejudice to petitioner's defense arose from his own negligence presents a substantial federal question under either the due process clause of the Fourteenth Amendment or the speedy trial provision of the Sixth Amendment applied to the states through the due process clause of the Fourteenth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES OF COURT INVOLVED

The following materials are set out in the Appendix: California Health and Safety Code sections 11501 and 11910; California Evidence Code sections 1041 and 1042(d); California Penal Code sections 1238(a)(8), 1239(a), 1382 subd. 2, 1387 and 1392; California Rules of Court, Rule 31(a).

STATEMENT OF THE CASE

On April 18, 1973, the Grand Jury of Stanislaus County issued an indictment charging petitioner Joseph Bellizzi with sale of heroin on or about January 31, 1973, in violation of California Health and Safety Code section 11501 (now section 11352) and two prior convictions, to wit, violation of California Health and Safety Code section 11910 (possession of a restricted dangerous drug) on April 10, 1970, in Alameda County, and violation of California Health

and Safety Code section 11501 (sale of heroin) on June 4, 1970, in Stanislaus County. (Exhibit A).[1]

On April 20, 1973, petitioner was arrested pursuant to a warrant issued on the basis of said indictment.

On April 27, 1973, petitioner was arraigned in the Superior Court of California in and for the County of Stanislaus at which time he entered a plea of not guilty to the charge of violation of Health and Safety Code section 11501 and denied both prior convictions.

On May 31, 1973, a jury trial was scheduled to begin on June 4, 1973. Petitioner also made a motion for pretrial discovery concerning the whereabouts of police informant Morrow. Petitioner's attorney, Mr. Elledge, wanted to talk to Morrow before the trial. Deputy District Attorney Milam advised Judge Halley that Morrow would be made available for trial, but that a satisfactory address was not then available. Morrow was regularly present at the police department where the district attorney's office served him with subpoenas. The hearing on petitioner's motion was put over until the next day. (Exhibit G).

On June 1, 1973, Milam and petitioner's attorney discussed the matter further before Judge Halley. Mr. Milam had received another address for Morrow which turned out not to be current. Petitioner's attorney requested Judge Halley to judicially notice that Morrow was the key informing witness for a

[1] Citations to exhibits refer to the exhibits which Real Party in Interest has submitted to this Court under separate cover. All of these exhibits were appended to the various briefs filed with the California Court of Appeal for the Fifth District and were before the California Supreme Court.

large number of indictments. He continued with his argument:

"MR. ELLEDGE: . . . Now under the provisions of the much later case, among others, which I have cited in my Points and Authorities, it's incumbent upon the People to maintain contact with the witness. They know it's important to them and perhaps to the respective Defendant, and just seems to me that—let me say it taxes my credulity to believe that the Police Department can't provide accurate information as to where this witness is.

"MR. MILAM: Your Honor, it's my understanding that the cases mentioned by Counsel require the maintenance of contact with the witness in order that a witness may be produced. That witness will be produced for trial. *It's my intention to call the witness to be produced tomorrow for Mr. Elledge to speak to him at his office alone.* I can't guarantee to effect that, but I fully expect that to occur.

"MR. ELLEDGE: *If in fact you do that, this will meet my requirement.* I will certainly make myself available so that there will be no call for His Honor to act upon the authorities I have cited.

"THE COURT: I have read them. *I'm going to do this: I'm going to order either you give him a valid address or produce it for him,* and if in the event this is produced, I will entertain a motion for a continuance of this trial. It's set for Monday, isn't it?

"MR. ELLEDGE: That's correct, and I might state, Your Honor, that our intention is to try it on Monday.

"THE COURT: That's fine.

"All right.

"MR. ELLEDGE: Thank you. *I will prepare an order accordingly.*

"THE COURT: Let the record show Mr. Bellizzi is present.

"MR. ELLEDGE: As I understand, Mr. Milam represented that all witnesses' statements have been provided for, is that correct?

"MR. MILAM: You have the things I mentioned in court, all the witnesses' statements have been provided for. There are no original notes.

"MR ELLEDGE: Fine. Thank you.

"THE COURT: All right." (Emphasis supplied.) (Exhibit H).

The substance of this colloquy was that Mr. Milam offered to produce Morrow, but not Morrow's current address. Petitioner's attorney stated that he found such an offer satisfactory. Judge Halley made an oral order in somewhat ambiguous language which apparently required the prosecution to produce either Morrow's current address *or* alternatively the witness Morrow himself. The preceding discussion between Mr. Milam and Mr. Elledge establishes that such an alternative was available. Taking this view of the oral order, the prosecution accordingly made Morrow available at Mr. Elledge's office at one o'clock on the afternoon of Saturday, June 2, where he was examined for approximately one and one-half hours. (Exhibits C, D, E and H).

On Monday morning, June 4, Judge Halley signed the written discovery order, which was apparently

prepared by petitioner's attorney. The written discovery order apparently required the production of Morrow's current address with no alternative for production of the witness. Whether petitioner's attorney or Judge Halley recalled that Monday morning, the exact terms of the oral order made the previous Friday morning is not disclosed by the record. But, apparently the prosecution did not receive a copy of the written order until the morning of June 4. Deputy District Attorney McAllister, who appeared for the prosecution on June 4, did not. McAllister did not appear at the hearing on June 1, and it was his understanding without having heard the oral order that the order was in the alternative, as explained above. (Exhibits E and I).

At the hearing on June 4 before Judge Cook, who was also absent from the hearing on June 1, petitioner's attorney made a motion for dismissal of the action on the basis of the prosecution's failure to comply with Judge Halley's *written* order. McAllister admitted that the prosecution's production of Morrow for examination did not comply with the written order, but noted that Morrow had been produced and would be produced again if necessary. When Judge Cook stated again that Judge Halley's written order had not been complied with, McAllister requested a hearing pursuant to California Evidence Code section 1042(d) to show cause to Judge Cook why Morrow's current address should not be released; there were valid reasons for not giving out Morrow's current address. (Exhibit I).

"THE COURT: . . . You may have your good reasons for it but the thing is the order has been made and it's my understanding Mr. Elledge's motion under the circumstances is good. I'm trying to see if you agree or disagree.

"MR. McALLISTER: I disagree with that because I think we have done something better than giving him a current address. We made him available in person.

"MR. ELLEDGE: If the Court that heard the motion felt that was a sufficient substitute the order wouldn't be made.

"MR. McALLISTER: I am not aware the Court who heard the motion knew that is what we were going to do.

"THE COURT: That could have been offered as an alternate at that time.

"MR. ELLEDGE: The matter was fully recorded. There was no suggestion or excuse made for not providing the address. The matter was heard. No evidence was adduced to the contrary or in conflict with the application and the case cited in support of my position at this moment was cited at that time. No authority to the contrary was cited by opposing counsel.

"THE COURT: I don't think I have any choice. The order has not been complied with. You tell me the District Attorney will not comply with it. The motion to dismiss will be granted.

"MR. ELLEDGE: Thank you.

"THE COURT: Bail will be exonerated."

(Exhibit I).

The prosecution did not further press its interpretation of the oral discovery order or its claim for a

hearing pursuant to Evidence Code section 1042(d). Instead, the prosecution chose to refile the charges against petitioner. Accordingly a complaint was promptly filed on June 6. The complaint charged petitioner with the same offense and prior convictions as alleged in the earlier indictment.

On June 12, 1973, petitioner was arrested pursuant to a warrant issued on said complaint.

On June 13, 1973, petitioner was arraigned on said complaint and entered a plea of not guilty to the charge of violation of Health and Safety Code section 11501 and denied the prior convictions.

On June 29, 1973, petitioner's motion to dismiss the action was denied.

On July 20, 1973, an information was filed in the Superior Court of Stanislaus County charging petitioner with the same offense and the same prior convictions alleged in the complaint.

On July 23, 1973, petitioner was arraigned on said information, entered a plea of not guilty to the charge and denied the prior convictions.

On August 24, 1973, petitioner admitted the prior convictions.

On August 31, 1973, petitioner filed a notice of motion for dismissal. Said motion was denied on September 7, 1973. (Exhibit M).

On September 17, 1973, the date set for trial, a continuance was granted at petitioner's request and the trial date was set for the following day. (Exhibit N).

On September 18, 1973, petitioner abruptly renewed

his motion to dismiss which was then denied. Petitioner's motion for a one-day continuance was granted. (Exhibit O).

On September 19, 1973, petitioner's motion for a continuance was granted, and the trial date was reset to October 23, 1973. (Exhibit P).

On October 18, 1973, petitioner's renewed motion to dismiss the information was denied. (Exhibit Q).

On October 23, 1973, petitioner requested time to file a petition for writ of prohibition. (See Appendix F to the Petition). On October 24, 1973, petitioner filed a petition for a writ of prohibition or mandate in the California Court of Appeal, Fifth Appellate District. On November 16, 1973, said court issued an order to show cause.

On January 30, 1974, said court issued its opinion granting the writ. On February 4, 1974, said court issued an order for publication of said opinion. On February 14, 1974, said court denied Real Party in Interest's petition for rehearing.

On March 27, 1974, the California Supreme Court granted Real Party in Interest's petition for hearing.

On July 11, 1974, the California Supreme Court issued its opinion denying the writ. On August 28, 1974, said court denied petitioner's petition for a rehearing.

On November 25, 1974, petitioner filed the instant petition for a writ of certiorari with this Court.

STATEMENT OF THE FACTS

On January 31, 1973, at about 7:10 p.m. Officers Chet Stygar and Skip McKune and Detective Jim Boyd of the Modesto Police Department searched confidential police agent #19 (later identified as David Wayne Morrow) and his car, wired Morrow with a transmitter, and gave him $50.00. Morrow had no narcotics or other money. Stygar, McKune and Boyd followed Morrow to 136 James Street, Modesto, where Morrow entered petitioner's residence. (Exhibits A and B).

Morrow asked if petitioner knew where he could get some heroin. Petitioner said, "Yes, I have some for sale." Petitioner explained that he had sold his last balloon, but had some left for himself. Petitioner went to the bedroom to get it. Morrow called out, "I don't want it all lactosed, Joe." Petitioner responded, "Come on in and I will show you what I have left." Petitioner put the powder in a red balloon for which Morrow paid him $40.00. A tape recording was made of these conversations between petitioner and Morrow. (Exhibits A and B).

Morrow returned to the officers and gave them the red balloon, which was subsequently analyzed by James Streeter, a criminalist for the California Department of Justice, and found to contain heroin. (Exhibits A and B).

A friend of petitioner, Harold Evans, was allegedly present at petitioner's residence during part of the time that Morrow was there. Petitioner allegedly ar-

ranged with his friend Evans for Evans to be available for petitioner's trial on an informal (unsubpoenaed) basis. On June 4, 1973, petitioner allegedly told Evans that the charges against him had been dismissed. (Exhibit L).

After petitioner allegedly spoke to Evans on June 4, 1973, Evans apparently disappeared. He was not located for the pending trial on the refiled charges despite the prosecution's voluntary attempts to locate him through Evans' mother, Evans' California probation officer and Evans' Oregon supervising probation officer. (Exhibit F).

SUMMARY OF ARGUMENTS

Petitioner has failed to raise any substantial federal question as to any Fourteenth Amendment due process rights in connection with the disappearance of his friend Evans and his unavailability at trial. Petitioner's attempt to enlarge upon the due process rights available to him under the speedy trial provision of the Sixth Amendment by claiming additional due process rights must fail. Since petitioner was an "accused" at the time he allegedly suffered prejudice, he is entitled to whatever process is due him as an "accused". It would therefore be inappropriate for this Court to extend similar due process protections to the period prior to arrest on the facts of the instant case. Nor does the record disclose any violation of petitioner's due process rights by reason of the prosecution's alleged oppressive conduct.

Petitioner has also failed to raise any substantial federal question as to his rights under the speedy trial provision of the Sixth Amendment. The California Supreme Court fully considered petitioner's speedy trial claim on the basis of the state law—both statutory and constitutional—and indicated that the same result obtained from the application of the appropriate federal constitutional test of *Barker* v. *Wingo,* 407 U.S. 514, 530–533 (1972). No substantial federal question is raised because the California Supreme Court correctly applied the applicable federal law test to the facts of the instant case.

ARGUMENT

I. Petitioner fails to raise any substantial federal question under the due process clause of the Fourteenth Amendment

Petitioner has failed to establish that he is entitled to relief on the basis of Fourteenth Amendment due process rights resulting from the disappearance of his friend Evans and his unavailability at trial. Petitioner relies upon cases of the California state courts and federal courts of the District of Columbia Circuit in which those courts, respectfully, have exercised supervisory powers pursuant to the due process clauses of the California and United States Constitutions to provide relief to criminal defendants whose cases have been prejudiced by so-called prearrest or preindictment delay during the period before such a defendant became an "accused" within the meaning of the Sixth Amendment. Such supervisory power need not be

exercised in the instant case because petitioner was an "accused" when the alleged prejudice occurred. Any rights to which petitioner is entitled are thus fully protected by the application of the speedy trial provision of the Sixth Amendment.

Petitioner's primary reliance is placed upon the case of *Dickey* v. *Florida*, 398 U.S. 30 (1970). The decision in that case rests squarely upon the speedy trial provision of the Sixth Amendment, and thus does not support petitioner's claim of an independent due process right.

Petitioner further relies on a line of cases from the District of Columbia Circuit: *Ross* v. *United States*, 349 F.2d 210 (1965); *Powell* v. *United States*, 352 F.2d 705 (1965); *Jackson* v. *United States*, 351 F.2d 821 (1965); *United States* v. *Curry*, 284 F.Supp. 458 (1966). In each of those cases the federal court applied its federal supervisory powers to a federal prosecution to give a defendant enlarged due process rights to cover the period before he became an "accused" within the meaning of the Sixth Amendment. *See, United States* v. *Marion*, 404 U.S. 307, 313–320 (1971). Such additional protection is unnecessary when the defendant was an "accused" at the time the alleged prejudice occurred.

As noted in the California Supreme Court's opinion, at 12 Cal.3d 37, the trial court's order of dismissal on June 4, 1973, was not a final order under applicable state law. The order did not become final until the People's time for appeal had expired. That

period was 60 days in the instant case. California Penal Code sections 1238(a)(8) and 1239(a); California Rules of Court, Rule 31(a). Until the order of dismissal became final, the defendant remained an "accused" within the meaning of the Sixth Amendment. Petitioner knew or should have known that the charges against him could be revived, either by reversal of the order of dismissal on appeal or by the People's recharging him with the same offense, as was in fact done, pursuant to California Penal Code section 1387. *People* v. *Uhlemann*, 9 Cal.3d 662 (1973); *People* v. *Williams*, 71 Cal.2d 614, 622–623 (1969).

For the same reason, i.e., that petitioner was an "accused" when his friend disappeared, there is no need for this Court to implement the prearrest and preindictment due process rights which California courts already apply to the period before a defendant has been "accused". *People* v. *Archerd*, 3 Cal.3d 615 (1970); *Jones* v. *Superior Court*, 3 Cal.3d 734 (1970); *People* v. *Vanderberg*, 32 Cal.App.3d 5 6 (1973); *Penney* v. *Superior Court*, 28 Cal.App.3d 941 (1972); *People* v. *Wright*, 2 Cal.App.3d 732 (1969).

Nor does petitioner have a legitimate claim that his due process rights were violated by reason of the prosecution's alleged intentional suppression of defense evidence. The California Supreme Court properly determined that petitioner's friend was unavailable as the resul' of petitioner's own negligence. The evidence here shows that the prosecution never in-

tended to hinder the petitioner's ability to present his defense and that the disappearance of petitioner's friend was the inevitable result of the petitioner's actions—not the prosecution's. *In re Ferguson*, 5 Cal.3d 525, 532 (1971). Clearly the prosecution must bear the burden of using reasonable efforts to locate and produce its own agents who might give testimony favorable to the defendant. *Brady* v. *Maryland*, 373 U.S. 83 (1963); *Roviaro* v. *United States*, 353 U.S. 53 (1957); *People* v. *Goliday*, 8 Cal.3d 771 (1973); *Eleazor* v. *Superior Court*, 1 Cal.3d 847 (1970); *People* v. *Kiihoa*, 53 Cal.2d 748 (1960); *Harris* v. *Superior Court*, 35 Cal.App.3d 24 (1973). It is equally clear that the defendant — and not the prosecution — must bear the burden of locating and producing his own witnesses. Inability of the defense to locate its own witnesses is not grounds for dismissal. *People* v. *Kirkpatrick*, 7 Cal.3d 480 (1972).

In the instant case there is no indication that the prosecution knew of Evans' whereabouts or contemplated his disappearance when the original indictment was dismissed. Petitioner was the one who contacted his friend and terminated the informal agreement whereby Evans would be available to testify at petitioner's trial. Since petitioner knew or should have known that the charges against him could be revived, he must bear the responsibility for Evans' unavailability. Petitioner should not profit from his own negligence; nor should he be permitted to manufacture his own prejudice.

Real Party in Interest submits that petitioner fails to raise any substantial federal question under the due process clause of the Fourteenth Amendment resulting from the disappearance of Evans and his unavailability at trial.

II. Petitioner fails to raise any substantial federal question under the speedy trial provision of the Sixth Amendment

Petitioner's claims that his right to a speedy trial was violated under California Penal Code section 1382,[2] subd. 2, and the California Constitution are clearly not matters subject to review by this Court. *Eisenstadt* v. *Baird*, 405 U.S. 438, 442 (1972). Petitioner was given full consideration of these state claims under those protections of state law which supplement the protections of federal law. The California Supreme Court properly rejected those claims for the reasons given in its opinion, at 12 Cal.3d 38.

Petitioner's claim that his federal speedy trial right was violated does not raise any substantial federal question as to the test to be applied. The current test is that enunciated in *Barker* v. *Wingo*, 407 U.S. 514, 530–533 (1972). The California Supreme Court recognized that *Barker* v. *Wingo* provides the applicable federal test. See also, *Sykes* v. *Superior Court*, 9 Cal. 3d 83, 93 (1973), in which the California Supreme Court considered the result which would be reached under the *Barker* test even where that test was not

[2] Petitioner's citation of California Penal Code section 1392 is clearly in error since that section concerns service of a summons upon a corporate defendant.

applicable because the defendant was entitled to relief on state law grounds. Since the California Supreme Court applied the proper federal test, a substantial federal question could result only from a misapplication of that test to the facts of the case. As will be demonstrated below, the California Supreme Court reached the proper result.

The first factor to be considered in the *Barker* balancing test is the length of the delay. Petitioner first became an "accused" when he was arrested on April 20, 1973, on the basis of a warrant issued on an indictment issued on April 18, 1973. Prior to June 4, 1973, the date set for petitioner's trial, he was on bail. Petitioner points to no specific prejudice to him or to his defense arising during that period. Nor did he suffer any lengthy pretrial incarceration during the period he was released on bail. The relevant period of delay began on June 4, 1973. A new complaint was promptly filed against petitioner on June 6, 1973, and he was rearrested on June 12, 1973. Subsequently, petitioner's trial date was set for September 17, 1973. Although the trial court thereafter granted petitioner several continuances to attempt to locate his witness and to make pretrial motions, the prosecution was at all times prepared to proceed to trial. Real Party in Interest submits that the delay complained of during which petitioner was allegedly prejudiced was at most only eight days, from June 4 to June 12, 1973.

The second consideration under the *Barker* test is the prosecution's justification for the delay. First, as

to the two days which were taken to file the new complaint and the additional six days taken to rearrest petitioner, Real Party in Interest submits that the time periods were in no way unreasonable. The prosecution could hardly have acted more quickly. Moreover, under the applicable state law, as explained in Argument I, *supra*, the prosecution had 60 days from June 4 within which to file a timely notice of appeal from the order of dismissal. Had the prosecution elected to appeal much more time would have been consumed in the appellate process. Thus, the prosecution acted not only in a timely fashion, but with much more expeditious procedures than were actually required. In this regard, *see United States* v. *Ewell*, 383 U.S. 110 (1966). Second, the prosecution did not act unreasonably in suffering the order of dismissal. As explained above in the statement of the case, the prosecution sought to protect police informant Morrow by keeping his current address confidential. The prosecution guaranteed Morrow's attendance at the trial. The prosecution also made Morrow available to petitioner's attorney at his office for questioning after ascertaining in open court that such a procedure would be satisfactory to petitioner. Petitioner had ample opportunity to conduct his discovery and never advanced any reason for needing Morrow's current address.[3] Suddenly on Monday morning, June 4, the

[3] Real Party in Interest suggests that even if Morrow's address might conceivably have been of use to petitioner, his address at the time of the sale on January 31, 1973, and not his address on June 1, 1973, would have been the only address even arguably relevant to petitioner's case. Petitioner was not

date set for trial, petitioner's attorney produced a written discovery order which he had prepared requiring the prosecution to produce Morrow's current address. When the deputy district attorney argued that the prosecution had substantially complied with the written order—believed it had actually complied with the oral order—and ought to be given an opportunity to show cause why the current address should not be disclosed, petitioner demanded that the indictment be dismissed immediately even though the prosecution offered to produce Morrow again for further pretrial examination if necessary. Despite its valid police purpose for keeping the current address confidential and its reasonable belief that it had given petitioner the discovery due him under the actual oral discovery order, the prosecution was momentarily stymied in its attempt to give petitioner his timely trial. At no time did the prosecution seek to hamper petitioner's defense or gain an unwarranted advantage. Real Party in Interest submits that the delay in recharging petitioner was minimal and fully justified by the exigencies of the predicament in which the deputy district attorney suddenly found himself.

The third element of the *Barker* test is the defendant's assertions of his right. When the prosecution sought to bring petitioner to trial on June 4 he demanded an immediate dismissal of the indictment

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engaged in cross-examining the witness and failed to suggest that there was any legitimate purpose to be served by his learning Morrow's current address, as was done in the cases petitioner cites. *Alfred* v. *United States*, 282, U.S. 687 (1931); *People* v. *Mascarenas*, 21 Cal.App.3d 660 (1971).

rather than discussing alternate methods for the prosecution to satisfy his unreasonable discovery demands. Since that time, despite the prosecution's continuing attempts to bring petitioner to trial, he has managed to avoid prosecution by gaining time to locate his friend Evans (with which Real Party has no quarrel) and by asserting his right to a speedy trial.

The fourth and final factor of the *Barker* test is prejudice to the defendant. As noted above, petitioner was not subjected to any lengthy pretrial incarceration. Nor does he claim to have suffered any undue anxiety. His claim of prejudice is that his defense is impaired because his friend Evans has mysteriously disappeared. But petitioner was the one who contacted his friend and terminated the alleged informal agreement whereby Evans would be available to testify at petitioner's trial. Even though petitioner knew or should have known that the charges against him could be revived, he apparently made no attempt to insure his friend's continued availability. The California Supreme Court properly determined that since Evans' unavailability was primarily the result of petitioner's own negligence he should not be permitted to benefit from that negligence by weighing it in the balance as prejudice for which the prosecution was responsible. So viewed, any prejudice to petitioner for which the prosecution bears the burden of responsibility is negligible.

In sum, the California Supreme Court properly held that petitioner should be denied relief upon the basis of the applicable federal test. The relevant delay was of short duration—at most eight days.[4] The prosecution had legitimate reasons for the delay, none of which included any attempt to be oppressive, and the prosecution used the most expeditious methods available to it to minimize the delay once some delay had occurred by promptly refiling the charges against petitioner. Although petitioner has repeatedly asserted his speedy trial right as a ground for avoiding prosecution, petitioner's demand for an immediate dismissal of the indictment triggered the minimal delay which did occur at a time when petitioner could have received a trial directly. Finally, petitioner has not been prejudiced by the prosecution. Rather, he has been prejudiced by his own actions with respect to his own friend and prospective witness. On balance petitioner's demand for a dismissal of all charges against him was properly denied.

Moreover, the cases upon which petitioner relies do not support petitioner's claims. In *United States* v. *Marion*, *supra*, at 325–326, this Court held that a 38-month delay prior to indictment was not grounds for dismissal where the defendant failed to show that the delay inevitably caused him any prejudice. And in *Barker* v. *Wingo*, *supra*, *Dickey* v. *Florida*, *supra*,

[4] Even if it were assumed that the relevant period of delay was of somewhat longer duration as petitioner contends, the result of the balancing test could be no different. All periods of claimed delay were neither unreasonable nor unjustified.

Smith v. *Hooey*, 393 U.S. 374 (1969), and *Klopfer* v. *North Carolina*, 386 U.S. 213 (1967), the defendants were subjected to delays amounting to several years during which charges were pending against them while they actively requested the prosecution to proceed to trial or dismiss the charges against. Those defendants suffered both extensive pretrial incarceration and the unjustified requirement of facing stale charges. Such, also, was the situation in the more recent case of *Moore* v. *Arizona*, 414 U.S. 25 (1973). But these cases do not apply to petitioner's case. He has not suffered lengthy pretrial incarceration with the prospect of facing stale charges. Nor has he ever actively sought to have the prosecution proceed to trial on the charges against him. Petitioner has tried to use his right to a speedy trial as a sword rather than a shield — as a means of cutting off prosecution rather than as a means of avoiding oppressive or untimely prosecution tactics. The cases cited above do not sanction such defense tactics; nor should such tactics be permitted. If a defendant could avoid prosecution by maneuvering the prosecution into an impossible situation and then permit his own witness to mysteriously disappear, the prosecution would be unable to proceed against many unscruplous defendants. Such a result is neither warranted by the existing cases, nor warranted by the facts of the instant one.

Real Party in Interest submits that petitioner has failed to present a substantial federal question because the California Supreme Court recognized the appli-

cable federal test of *Barker* v. *Wingo, supra,* and properly applied that test to the facts of the instant case.

CONCLUSION

For the foregoing reasons, we respectfully submit that the instant petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDICES

APPENDIX A

CALIFORNIA HEALTH AND SAFETY CODE

11501. Except as otherwise provided in this division, every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport any narcotic other than marijuana, except upon the written prescription of a physician, dentist, podiatrist, or veterinarian licensed to practice in this state, shall be punished by imprisonment in the state prison for a period of five years to life and shall not be eligible for release upon completion of sentence or on parole or any other basis until he has been imprisoned for a period of not less than three years in the state prison.

If such person has been previously convicted once of any felony offense described in this division or Section 11911, 11912, or 11913 or of any offense under the laws of any other state or the United States which, if committed in this state, would have been punishable as a felony offense described in this division or Section 11911, 11912, or 11913, the previous conviction shall be charged in the indictment or information and, if found to be true by the jury upon a jury trial or by the court upon a court trial or if admitted by the person, he shall be imprisoned in the state prison for a period of 10 years to life and shall not be eligible for release upon completion of sentence or on parole or any other basis until he has been imprisoned for a period of not less than 10 years in the state prison.

If such person has been previously convicted two or more times of any felony offense described in this division or Section 11911, 11912, or 11913 or of any offense under the laws of any other state or the United States which, if committed in this state, would have been punishable as a felony offense described in this division or Section 11911, 11912, or 11913, the previous convictions shall be charged in the indictment or information and, if found to be true by the jury upon a jury trial or by the court upon a court trial or if admitted by the person, he shall be imprisoned in the state prison for a period of 15 years to life and shall not be eligible for release upon completion of sentence or on parole or any other basis until he has been imprisoned for a period of not less than 15 years in the state prison.

APPENDIX B

CALIFORNIA HEALTH AND SAFETY CODE

11910. Except as otherwise provided in Article 8 (commencing with Section 4210) of Chapter 9 of Division 2 of the Business and Professions Code, every person who possesses any restricted dangerous drug, except upon the prescription of a physician, dentist, podiatrist, or veterinarian licensed to practice in this state, shall be punished by imprisonment in the county jail for a period of not more than one year or the state prison for a period of not less than one year nor more than 10 years.

If such person has been previously convicted once of any felony offense described in this division, of a conspiracy to commit any offense described in this division, or of any offense under the laws of any other state or the United States which, if committed in this state, would have been punishable as an offense described in this division, the previous conviction shall be charged in the indictment or information and, if found to be true by the jury upon a jury trial or by the court upon a court trial or if admitted by the person, he shall be imprisoned in the state prison for a period of not less than two years or more than 20 years and shall not be eligible for release upon completion of sentence or on parole or any other basis until he has been imprisoned for a period of not less than two years in the state prison.

APPENDIX C
CALIFORNIA EVIDENCE CODE

1041. Privilege for identity of informer. (a) Except as provided in this section, a public entity has a privilege to refuse to disclose the identity of a person who has furnished information as provided in subdivision (b) purporting to disclose a violation of a law of the United States or of this state or of a public entity in this state, and to prevent another from disclosing such identity, if the privilege is claimed by a person authorized by the public entity to do so and:

(1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state; or

(2) Disclosure of the identity of the informer is against the public interest because there is a necessity for preserving the confidentiality of his identity that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the identity of t' informer be disclosed in the proceeding. In determining whether disclosure of the identity of the informer is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered.

(b) This section applies only if the information is furnished in confidence by the informer to:

(1) A law enforcement officer;

(2) A representative of an administrative agency charged with the administration or enforcement of the law alleged to be violated; or

(3) Any person for the purpose of transmittal to a person listed in paragraph (1) or (2).

(c) There is no privilege under this section to prevent the informer from disclosing his identity.

APPENDIX D

CALIFORNIA EVIDENCE CODE

1042. Adverse order or finding in certain cases

(d) When, in any such criminal proceeding, a party demands disclosure of the identity of the informant on the ground the informant is a material witness on the issue of guilt, the court shall conduct a hearing at which all parties may present evidence on the issue of disclosure. Such hearing shall be conducted outside the presence of the jury, if any. During the hearing, if the privilege provided for in Section 1041 is claimed by a person authorized to do so or if a person who is authorized to claim such privilege refuses to answer any question on the ground that the answer would tend to disclose the identity of the informant, the prosecuting attorney may request that the court hold an in camera hearing. If such a request is made, the court shall hold such a hearing outside the presence of the defendant and his counsel. At the in camera hearing, the prosecution may offer evidence which would tend to disclose or which discloses the identity of the informant to aid the court in its determination whether there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial. A reporter shall be present at the in camera hearing. Any transcription of the proceedings at the in camera hearing, as well as any physical evidence presented at the hearing, shall be ordered sealed by the court, and only a court may have access to its contents. The court shall not order disclosure, nor strike the testimony of the witness who invokes the privilege, nor dismiss the criminal proceeding, if the party offering the witness refuses to disclose the

identity of the informant, unless, based upon the evidence presented at the hearing held in the presence of the defendant and his counsel and the evidence presented at the in camera hearing, the court concludes that there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial.

APPENDIX E

CALIFORNIA PENAL CODE

1238. Appeal by people

(a) An appeal may be taken by the people from any of the following:

(8) An order or judgment dismissing or otherwise terminating the action before the defendant has been placed in jeopardy or where the defendant has waived jeopardy.

APPENDIX F

CALIFORNIA PENAL CODE

1239. Manner of taking appeal; automatic appeal from judgment of death

(a) Where an appeal lies on behalf of the defendant or the people, it may be taken by the defendant or his counsel, or by counsel for the people, in the manner provided in rules adopted by the Judicial Council.

APPENDIX G

CALIFORNIA PENAL CODE

1382. Failure to file information or bring case to trial within time limit; dismissal

2. When a defendant is not brought to trial in a superior court within 60 days after the finding of the indictment or filing of the information or, in case the cause is to be tried again following a mistrial, an order granting a new trial from which an appeal is not taken, or an appeal from the superior court, within 60 days after such mistrial has been declared, after entry of the order granting the new trial, or after the filing of the remittitur in the trial court; except that an action shall not be dismissed under this subdivision if it is set for trial on a date beyond the 60-day period at the request of the defendant or with his consent, express or implied, or because of his neglect or failure to appear and if the defendant is brought to trial on the date so set for trial or within 10 days thereafter.

APPENDIX H

CALIFORNIA PENAL CODE

1387. Dismissal as bar in misdemeanor cases, but not in felony cases

An order for the dismissal of the action, made as provided in this chapter, is a bar to any other prosecution for the same offense if it is a misdemeanor, but not if it is a felony.

APPENDIX I

CALIFORNIA PENAL CODE

1392. Summons; service; time

WHEN AND HOW SERVED. The summons must be served at least five days before the day of appearance fixed therein, by delivering a copy thereof and showing the original to the President or other head of the corporation, or to the Secretary, Cashier, or managing agent thereof.

APPENDIX J

CALIFORNIA RULES OF COURT

Rule 31. Notice of appeal

(a) [Time of filing] In the cases provided by law, an appeal is taken by filing a written notice of appeal with the clerk of the superior court within 60 days after the rendition of the judgment or the making of the order. A notice of appeal filed prior to the time prescribed therefor is premature but may, in the discretion of the reviewing court for good cause, be treated as filed immediately after the rendition of the judgment or the making of the order.

Whenever a notice of appeal is received by the clerk of the superior court after the expiration of the period prescribed for filing such notice, the clerk shall mark it "Received (date) but not filed" and advise the party seeking to file the notice that it was received but not filed because the period for filing notice of appeal had elapsed.